[HIGH COURT OF AUSTRALIA.]

DAVIDSON AND ANOTHER . . . . APPELLANTS;
RESPONDENTS,

AND

MOULD . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3; *May* 4.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Workers' Compensation—Injury arising "in the course of the employment"—Meal taken by permission on employers' premises—Worker injured while opening bottle—Workers' Compensation Act 1926-1942 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 13 *of* 1942), *s.* 6 (1).

While, with the knowledge and encouragement of his employers, a worker was having his midday meal in the workshop where he was employed, he experienced difficulty in removing the crown seal from a bottle of non-intoxicating beverage which he proposed to drink as part of his meal and which, in accordance with the practice at the workshop, had been purchased and brought in for him by a fellow employee. The worker took the bottle to a vice in the workshop and opened it by holding the edge of the crown seal in contact with the vice and hitting down on the seal with his clenched fist. In consequence something flat flew from the bottle, apparently the crown seal, hit him in the left eye and caused injury which resulted in the removal of the eye.

Held, by *Rich*, *Starke*, *McTiernan* and *Williams* JJ. (*Latham* C.J. dissenting), that there was evidence on which the Workers' Compensation Commission (N.S.W.) could find that the injury to the worker arose "in the course of employment" within the meaning of s. 6 of the *Workers' Compensation Act* 1926-1942 (N.S.W.).

Decision of the Supreme Court of New South Wales (Full Court): *Davidson* v. *Mould*, (1943) 44 S.R. (N.S.W.) 113; 61 W.N. (N.S.W.) 117, by majority, affirmed.

APPEAL from the Supreme Court of New South Wales.

In a claim brought by him under the *Workers' Compensation Act* 1926-1942 (N.S.W.), Maxwell Walter Mould, aged sixteen years, by

his next friend William Edward Mould, claimed from his employers, George Davidson and Sidney Smith, trading as Davidson & Smith, £375 lump sum compensation under s. 16 of the Act for the loss of his left eye, plus £8 11s. for hospital expenses and £2 10s. for an artificial eye.

Liability under the Act was denied by the employers on the grounds that the worker " did not receive personal injury arising out of or in the course of his employment " with them, and was " not incapacitated for work in consequence of such personal injury."

The Workers' Compensation Commission found the following facts :—The employers carry on the business of manufacturing saddlers in Sydney. The worker was employed by the employers in such business, his duties being those of a saddler. On Tuesday, 1st September 1942, (i) the worker was having his midday meal in the employers' workshop, which was his place of employment; (ii) the worker experienced some difficulty in removing the crown seal from a bottle of non-intoxicating beverage. He walked across the workshop to a vice, held the side of the metal seal in contact with the vice, and with a clenched fist hit down on the seal. In consequence, something flat from the bottle, apparently the crown seal, hit him in the eye causing injury. The injury so received resulted in (i) the worker's incapacity for work beyond the statutory waiting period; (ii) hospital treatment for the worker as an in-patient; and (iii) enucleation of the worker's left eye. The worker's ordinary hours of work were from 8.10 a.m. to 5.30 p.m., with a midday meal interval of one-half hour Monday to Friday inclusive. The injury was received during the midday meal interval on the said Tuesday. On the relevant day the worker and about twenty-four other employees were employed in the employers' workshop; two of the employees left the workshop and went elsewhere to have their midday meal; the worker and the others ate their meal in the workshop, purchase of such meal having been made outside the employers' premises by a junior prior to the meal break in accordance with established custom.

The Commission's finding that the employers carry on the business of manufacturing saddlers and that they employed the worker as a saddler was based on particulars filed by the worker in his application for determination. These were not denied by the employers and were taken to be admitted. Details of his duties were given by the worker in evidence.

The Commission took judicial notice of the Saddle, Harness and Leather Machine Belt Makers &c. (State) Award, made under the *Industrial Arbitration Act* 1940 (N.S.W.) and found that the worker's

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contract of service with the employers incorporated relevant portions of that award. No reference to this award was made during the proceedings before the Commission. It was not tendered in evidence.

The Commission considered in particular three clauses of the award which provided as follows: Clause 2. Hours—The ordinary hours of work shall not exceed 44 per week, to be worked 8 hours 48 minutes per day, Monday to Friday, inclusive, between the hours of 7 a.m. and 6 p.m. Clause 3. Meal Time—(i) Employees shall be allowed a meal break of not less than 30 minutes each day, which shall commence not later than 1 p.m. (ii) The meal break having once been fixed shall not be altered except on seven days' notice by an employer to a shop steward employed in the factory, and where in any factory there is no shop steward, then upon notice to the secretary of the union. (iii) An employee called upon to work during a meal break shall be paid at the rate of time and a half, and such payment shall continue until a meal break is allowed. Clause 19. Dining Accommodation—(i) In factories where five or more employees are employed and it is or becomes reasonably practicable so to do, a separate room or portion of the factory or workshop shall be set aside by the employer as a dining room, and therein the employer shall provide adequate table and seating accommodation. (ii) Hot water shall be provided free of charge to be available to employees immediately meal time commences. (iii) The employer shall provide the necessary labour to keep such room clean. (iv) If such dining room is not regularly used by a reasonable number of the employees, the provisions of sub-clause (i) of this clause shall cease to operate.

From the terms of the award the Commission found that clause 19 imposed an obligation or duty on the employer to provide dining accommodation at the place of employment, but there was no similar obligation or duty imposed on the worker to use such accommodation. His use of the accommodation was a matter which the award left to his own discretion.

The Commission also found that—(i) the midday meal interval was not included in the 44 hours work for which the prescribed wage was payable, (ii) it was only when the worker was called upon to work during the meal interval that any payment was made in respect of it, (iii) while remaining in the workshop the worker was liable to the control of the employers; he could be called upon to work at time and a half rate of payment; he had not resumed the same relationship to his employers as an ordinary member of the public, which relationship would automatically arise when he reached the public highway on his own business during the midday meal interval.

The Commission inferred that—(*a*) the worker's presence on the employers' premises during the meal interval was due to the conditions of the employment, (*b*) although the worker was not obliged to remain there the employers encouraged him to do so by also permitting a boy prior to the meal interval to take orders for meals which were eaten on the premises during the meal interval, (*c*) the worker in having his midday meal at his place of employment was using statutory facilities in a manner which, by virtue of the industrial award provisions, was within contemplation under his contract of service with the employers and was sanctioned by established custom, (*d*) when injured the worker was doing a reasonable act incidental to the partaking of a midday meal, (*e*) the short interval of one half-hour in the day's work, which was spent by the worker in the employers' workshop in and about the worker's place of employment, and in doing a reasonable act incidental to the partaking of a midday meal there, did not, in the circumstances, constitute a break in the course of the employment.

The Commission found that the worker's injury arose both out of and in the course of his employment with the employers and accordingly made an award in his favour for the amounts claimed.

In a case stated pursuant to s. 37 (4) of the Act at the request of the employers the following questions were reserved for the decision of the Supreme Court of New South Wales :—

1. Did the Commission err in law in taking judicial notice of the Saddle, Harness and Leather Machine Belt Makers &c. (State) Award ?
2. Did the Commission err in law in holding that the award imposes an obligation on the employers to provide dining accommodation for its workers ?
3. Is there any evidence to support the Commission's finding that the injury received by the worker arose out of or in the course of his employment with the employers ?

The Supreme Court, by a majority, held that it was quite competent to the Commission to hold that the worker was in the course of his employment when he sustained his injury, if it thought this was the proper conclusion of fact upon the evidence. The Court ordered that the matter be remitted to the Commission for further consideration, including the hearing of further evidence if the parties had any to offer : *Davidson* v. *Mould* (1).

Upon the matter again coming on to be heard before the Commission the Australian Saddlery Leather Sail Canvas Tanning Leather

(1) (1943) 44 S.R. (N.S.W.) 113 ; 61 W.N. 117.

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Dressing and Allied Workers Employees' Award made by the Commonwealth Court of Conciliation and Arbitration, and the Saddle, Harness and Leather Machine Belt Makers &c. (State) Award made under the *Industrial Arbitration Act* 1940 (N.S.W.), were tendered in evidence. It was stated that both awards applied in part to the worker's employment.

Dealing with the case independently of the industrial awards, the Commission, on the evidence adduced, made additional findings as follows :—(*a*) that the worker was not an apprentice, (*b*) that the employers provided hot water at the midday meal interval for their employees, (*c*) that the employers permitted the worker to eat his midday meal in the workshop, the " boss " being present at the time, (*d*) that at the time when the worker sustained the injury he was doing something which was sufficiently associated with his employment to make it incidental to such employment, (*e*) that the injury so received by the worker arose—(i) in the course of his employment, (ii) out of his employment, (*f*) that the worker was entitled to the compensation claimed.

In compliance with a request made on behalf of the employers, the Commission referred the matter back to the Supreme Court, with an additional note sufficiently set forth above, for the decision of that Court as to whether there was any evidence to support the Commission's finding that the injury arose out of, or in the course of, the worker's employment.

The Supreme Court answered question 3 in the case stated in the affirmative.

From that decision the employers appealed to the High Court.

Fuller K.C. (with him *R. V. Edwards*), for the appellants. The finding of the Commission is not supported by any evidence given at the original hearing, nor is it supported by any of the additional facts. The opening of the bottle was not incidental to the taking by the respondent of his midday meal. It was not " part of nor incidental to his service " (*Whittingham* v. *Commissioner of Railways* (*W.A.*) (1)). It was not part of the respondent's employment " to hazard, to suffer, or to do that which caused his injury " (*Lancashire and Yorkshire Railway Co.* v. *Highley* (2) ; *Willis* on *Workmen's Compensation*, 35th ed. (1943), p. 45). The " determining facts " in this case have a force equal to those in *Whittingham* v. *Commissioner of Railways* (*W.A.*) (3). The principle is not affected by *Henderson* v. *Commissioner of Railways* (*W.A.*) (4), which was

(1) (1931) 46 C.L.R. 22, at pp. 27-29.
(2) (1917) A.C. 352, at p. 372.
(3) (1931) 46 C.L.R., at pp. 26, 28.
(4) (1937) 58 C.L.R. 281.

decided upon facts substantially different from the facts present in this case. A worker injured whilst having a meal on his employer's premises is entitled to compensation only if what happened in each particular case was something which was beyond the control of the worker himself and which happened either by default in the premises of the employer (*Blovelt* v. *Sawyer* (1)), or the act of a fellow employee (*Knight* v. *Howard Wall Ltd.* (2)). In *St. Helens Colliery Co. Ltd.* v. *Hewitson* (3) the test applied was based on a duty to the employer arising out of the contract of employment. The test laid down in *Weaver* v. *Tredegar Iron and Coal Co. Ltd.* (4) was : What was the workman doing at the time the accident happened ; was it in any way connected with his employment or was it an act that any member of the general public might do ? The realities of each case must be considered. Although having his midday meal in the workshop might be in the course of his employment, the particular method chosen by the respondent of removing the crown seal from the bottle was his own concern and had nothing to do with his employment. The evidence does not show whether the method so chosen was a reasonable or an unreasonable one. It was an unreasonable method.

Dwyer K.C. (with him *Brennan*), for the respondent. The only question before the Court is whether there is anything in the evidence which justifies the finding made by the Commission. That is a question of law. It is well settled that a worker injured while taking refreshment on the premises of his employer at a permitted time may be in the course of his employment (*Weaver* v. *Tredegar Iron and Coal Co. Ltd.* (5)). The fact that a worker is not, at the time of the accident, actually working at the thing he is employed to do does not remove him from the course of his employment. In every case it is a question of fact and degree (*Whittingham* v. *Commissioner of Railways* (*W.A.*) (6)). The taking of a meal, apart from particular incidents which have to be considered in each case, is not necessarily something so divorced from the worker's employment as not to be incidental to it (*Blovelt* v. *Sawyer* (7) ; *Brice* v. *Edward Lloyd Ltd.* (8) ; *John Stewart and Son* (1912) *Ltd.* v. *Longhurst* (9) ; *Charles R. Davidson & Co.* v. *M'Robb* (10) ; *Armstrong,*

(1) (1904) 1 K.B. 271 ; 6 B.W.C.C. 16.
(2) (1938) 55 T.L.R. 227 ; (1938) 4 All E.R. 667 ; 31 B.W.C.C. 483.
(3) (1924) A.C. 59, at p. 71.
(4) (1940) A.C. 955.
(5) (1940) A.C., at p. 966.
(6) (1931) 46 C.L.R., at pp. 26, 29.
(7) (1904) 1 K.B., at pp. 274, 275.
(8) (1909) 2 K.B. 804, at p. 809.
(9) (1917) A.C. 249, at p. 252.
(10) (1918) A.C. 304, at pp. 314, 315, 321.

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Whitworth & Co. v. *Redford* (1)). The course of the employment does not cease *instanter* when the work stops. It extends beyond the period of actual labour (*St. Helens Colliery Co. Ltd.* v. *Hewitson* (2) ; *Pearson* v. *Fremantle Harbour Trust* (3) ; *Henderson* v. *Commissioner of Railways* (*W.A.*) (4)). The question is : Was the method of opening the bottle as adopted by the respondent so dissociated from the taking of his meal as to make it obligatory, as a matter of law, to refuse the respondent compensation on the ground that that was not an act reasonably incidental to his work ?

Fuller K.C., in reply. Although the taking of the meal may be regarded as " a matter ancillary and incidental to the work on which he is employed " (*Armstrong, Whitworth & Co.* v. *Redford* (5)), the opening of the bottle was not. The opening of the bottle was itself " ancillary and incidental " to the taking of the meal. The facts of this case do not bring it within the principle of law stated in *Henderson* v. *Commissioner of Railways* (*W.A.*) (6). The respondent incurred an unnecessary risk and used the vice for a purpose that was not permitted (*Willis* on *Workmen's Compensation*, 35th ed. (1943), p. 112 ; *Heywood* v. *Broadstone Spinning Mill* (7)).

Cur. adv. vult.

May 4. The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales upon a case stated under the provisions of s. 37 (4) of the *Workers' Compensation Act* 1926-1942. The question upon which the appeal comes to this Court is whether there was evidence to support the finding of the Workers' Compensation Commission that an injury received by the respondent, Maxwell Walter Mould, arose out of or in the course of his employment with the appellants.

Mould was employed by the appellants, who were saddlery manufacturers. His hours of work were from 8.10 a.m. to 5.30 p.m., with a midday meal interval of half an hour on each working day, that is, from Monday to Friday. He, with the other workmen, was allowed by his employers to have his midday meal in the workshop. The employers not only allowed the workers to have their lunch in the workshop, but also supplied hot water and permitted a boy employee

(1) (1920) A.C. 757, at pp. 772, 778, 780.
(2) (1924) A.C., at pp. 71, 91.
(3) (1929) 42 C.L.R. 320, at pp. 326-328.
(4) (1937) 58 C.L.R., at pp. 290, 291, 293.
(5) (1920) A.C., at p. 779.
(6) (1937) 58 C.L.R., at pp. 293, 294.
(7) (1910) 128 L.T. News. 134.

to obtain food and drinks for them. On the day when the accident happened to Mould the boy bought a bottle of coca-cola for him. The employers did not supply the coca-cola. It was bought by the boy for the respondent, and the position was the same as if Mould had bought it personally, or had brought it from his home. The bottle was stoppered by a crown seal. Mould took the bottle to a vice in the workshop, and opened it by holding the side or edge of the metal seal in contact with the vice and hitting down on the seal with his clenched fist. Something sprang up from the bottle—apparently the crown seal (because there is no evidence that the bottle was broken)—and hit him in the left eye, causing injury which resulted in the removal of the eye.

The Commission took into account the provisions of an industrial award made under the New South Wales *Industrial Arbitration Act* 1940, holding that the award imposed an obligation upon the employer to provide dining accommodation at the place of employment. The Commission was also of opinion that under the award the worker was subject to the control of his employers in that he could be called upon to work during the midday meal period at time and a half rates. The Full Court disagreed with the decision of the Commission on both these points, and the award was not relied upon in this Court.

The Commission held that the worker received the injury while he was doing a reasonable act incidental to the partaking of his midday meal, which he was permitted to take upon his employers' premises; that there was accordingly no break in the course of the employment, and that therefore the injury was received in the course of the employment. The Commission also held that the injury arose out of the employment.

The *Workers' Compensation Act* 1926-1942 provides in s. 7 (1) that a worker who has received "an injury," whether at or away from his place of employment (and, in the case of the death of the worker, his dependants) shall receive compensation from his employer in accordance with the Act. Section 6 of the Act, as amended by Act No. 13 of 1942, s. 2, defines "injury" as meaning "personal injury arising out of *or* in the course of employment . . ." Until the amending Act was passed, "injury" was defined as meaning "personal injury arising out of *and* in the course of the employment . . ." When the definition was in this form it was necessary before a claim could be established to show that "a double condition" for the liability of the employer was satisfied, namely "a condition that the injury must arise, not only in the course of

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the employment, but out of it " (*Thom* v. *Sinclair* (1), per Viscount *Haldane*). Since the amending Act it is sufficient in New South Wales to show that the injury arose either out of or in the course of the employment.

An injury arises out of the employment when it arises from some risk incident to the duties of the service which the worker was engaged to perform. The injury in this case did not arise out of any risk incident to the work which the worker was employed to do, and it was not argued before us that the injury arose out of his employment.

The question is whether the injury arose in the course of his employment. In his judgment in the Full Court *Jordan* C.J. said : " In the phrase ' arising out of or in the course of employment,' ' out of ' denotes a causal relation between the employment and the injury, and ' in the course of ' a temporal relation. The first arm of the phrase is satisfied by proof that the fact of his being employed in the particular work caused, or to some material extent contributed to, the injury ; the second, by proof that the injury was sustained whilst he was doing the work which he was employed to do or something incidental to it " (2).

The latter words may be compared with the words of Lord *Finlay* in *Charles R. Davidson & Co.* v. *M'Robb* (3), which are frequently referred to for the purpose of expounding the meaning of " in the course of the employment "—" ' In the course of the employment ' must mean . . . in the course of the work which the man is employed to do, and what is incident to it—in other words, in the course of his service . . . ' In the course of the employment ' does not mean during the currency of the time of the engagement." I understand these words as intended to emphasize the point that the mere fact that an injury is received *during* a particular period of time during which period the worker is engaged upon his duties or upon something incidental thereto is not enough to show that the injury was received *in the course* of his employment. A purely temporal relation between the injury and the employment is not sufficient. Not everything that a worker does " during the currency of the time of engagement " is part of his work or incident to his work.

It was argued for the respondent that when a worker was permitted to have his meals upon his employer's premises, and he received an injury while he was engaged in having his meals there, he, by reason

(1) (1917) A.C. 127, at p. 133.
(2) (1943) 44 S.R. (N.S.W.), at pp. 114, 115 ; 61 W.N., at p. 118.
(3) (1918) A.C. 304, at pp. 314, 315.

of these facts, without more, became entitled to compensation under the Act. Reliance was placed upon a statement of Lord *Atkin* in *Weaver* v. *Tredegar Iron and Coal Co. Ltd.* (1): "It is well settled that a man injured while taking refreshment on the premises at a permitted hour or otherwise relieving necessities of nature is in the course of his employment." If this proposition is to be taken as completely representing the law, it is clear that there was evidence to support the award made by the Commission. Mould, the respondent, was injured while taking refreshment on his employers' premises at an hour at which his employer permitted him to take such refreshment there.

It has been held in many cases that the words "course of employment" do not mark a period beginning and ending with the actual hours of work. A man may be in the course of his employment while he is on his way to his work or leaving his work. A plain case is where he is necessarily walking through one part of a factory in order to reach or to leave the part of the factory where his actual work lies.

The course of employment may continue without break where a worker, with the permission of his employer, takes meals on the employer's premises (*Blovelt* v. *Sawyer* (2)). In that case a workman was permitted to take his meal on the premises, and, while he was doing so, a wall fell on him. It was held that the accident happened in the course of the man's employment, though he was not paid for meal periods, and though he was not at the time engaged in working for his employer.

The respondent relied strongly upon the case of *Knight* v. *Howard Wall Ltd.* (3). In that case a worker was injured by a dart thrown by a fellow employee while he was eating his midday meal in a canteen provided by the employers which the workmen were allowed to use, but which they were not bound to use. *Blovelt* v. *Sawyer* (4) was applied and the Court of Appeal relied also upon *Brice* v. *Edward Lloyd Ltd.* (5), where it was held that a worker was not entitled to recover compensation where he took his meals at a place in his employer's premises where he had no right to go. A passage from the judgment of *Farwell* L.J. in this case, to which *Slesser* L.J. referred in *Knight's Case* (6), is reported in the following words: "It is now well settled that the word 'employment' in the Act is not to be confined to actual work. In my opinion it extends to all

(1) (1940) A.C. 955, at p. 966.
(2) (1904) 1 K.B. 271.
(3) (1938) 55 T.L.R. 227; (1938) 4 All E.R. 667.
(4) (1904) 1 K.B. 271.
(5) (1909) 2 K.B. 804.
(6) (1938) 55 T.L.R., at pp. 228, 229; (1938) 4 All E.R., at p. 670.

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things which the workman is entitled by the contract of employment expressly or impliedly to do. Thus he is entitled to pass to and from the premises and to take his meals on the premises. But he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden" (1). In the present case it was held that the worker was doing a reasonable thing (namely, opening a bottle in a manner not contended to be unreasonable) which was incidental to his meal.

If the quotations which I have made from the foregoing authorities are taken literally and applied to the facts of the present case, and not limited to the facts of the cases which were before the court at the time when the words were used, it would appear to follow that, as the worker's injury happened at a time when it could not be said that there was a break in his employment, the injury arose in the course of his employment. But it has not yet been finally established that whenever an injury is received by a worker on the premises of his employer at a time when he is entitled as an employee to be upon those premises, he is entitled to recover compensation, whatever the nature and circumstances of the injury may be.

If an injury had been received by the worker just because he was in the workroom, then the injury would be an injury in the course of his employment—if, for example, as in *Blovelt's Case* (2), a wall fell upon him, or if a fly wheel of a machine in the room burst and injured him. His presence in the workroom was permitted; the fact that he was in the workroom eating his lunch did not terminate his employment *pro tempore*; thus he was present in the workroom in the course of his employment, and any risks which might be described as locality risks were risks incidental to his employment.

The question which should be asked, in my opinion, is not: "How did the worker come to be in the workroom eating his lunch?"—but, "How did the worker come to open the bottle in the workroom?" It may, in my opinion, properly be said that he was in the workroom in the course of his employment, but not that he was opening the bottle in the course of his employment. The distinction is, I think, well expressed by Lord *Finlay* in *Charles R. Davidson & Co.* v *M'Robb* (3), where it is said:—"In the case of a domestic servant who sleeps and takes his meals in his master's house he is in the course of his service all the time—his service is interrupted if he goes out on his own business or pleasure. A workman who by the terms of his employment takes his meals on his employer's premises is in the course of his service in being there at meal times. In either

(1) (1909) 2 K.B., at p. 809. (2) (1904) 1 K.B. 271.
(3) (1918) A.C., at pp. 314, 315.

case the master or employer would be liable for damage caused by such an accident as happened in *Thom* v. *Sinclair* (1) as it would arise out of the employment, an incident of which is the presence of the servant or workman upon the premises when partaking of his meals; but different considerations might apply if the injury proceeded from choking over a morsel of food, as the act of eating may be no part of the service."

The accident which happened in *Thom* v. *Sinclair* (1) was due to the fall of an adjoining wall upon premises within which the appellant was working—a locality risk. In the present case the injury occurred, not simply because the worker was in the workroom, but because he opened a bottle in a particular manner which accidentally caused injury to him. In the course of the argument before this Court cases were put of a worker bringing his own lunch into the workroom and suffering injury as the result of eating a sandwich containing bad meat, or of drinking a poisonous drink, or of cutting his hand while peeling an apple. The worker might be in the course of his employment so far as his presence in the room was concerned, and yet the employer should not, I venture to suggest, be held liable for the result of the worker eating the dangerous sandwich, or drinking poisonous beer, or cutting his hand.

In *Armstrong, Whitworth & Co.* v. *Redford* (2) Lord *Sumner* said:—"I cannot accept the argument that a workman gets his dinner 'in the course of' his employment merely because he must get his dinner some time or other, because we must all eat to live. Dining is 'ancillary' and 'incidental' to his continued utility no doubt, but that in itself does not make him dine in the course of his service, nor is dining for that reason part of his service." See also the statement quoted by my brother *Starke* (*post*) from the judgment of *Atkin* L.J. in *Smidmore* v. *London & Thames Haven Oil Wharves Ltd.* (3).

In my opinion *Knight's Case* (4) ignores the fact that there must be some relation other than a merely temporal relation between an injury and an employment to justify a finding that the injury arose in the course of the employment. That case is, I think, irreconcilable with the meaning attributed to "in the course of the employment" in *Whittingham* v. *Commissioner of Railways* (*W.A.*) (5).

The evidence that the worker was permitted to eat his lunch on the premises of the employer, and that he received an injury while doing so, is not, in my opinion, evidence that the injury was received

(1) (1917) A.C. 127.
(2) (1920) A.C., at p. 774.
(3) (1921) 14 B.W.C.C. 114, at p. 120.
(4) (1938) 55 T.L.R. 227; (1938) 4 All E.R. 667.
(5) (1931) 46 C.L.R. 22.

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in the course of his employment. In order to show that the injury was so received it would be necessary to show further that the particular act which caused the injury was either part of the service which he was employed to render, or was itself incidental to that service. There is no evidence that this was the case and, therefore, in my opinion, the appeal should be allowed and the question whether there was evidence to support the Commission's finding that the injury received by the worker arose out of or in the course his employment should be answered in the negative.

RICH J. The decision by the Commission of the question whether the injury received by the respondent worker arose out of or in the course of his employment was one of fact. The appeal to the Supreme Court and to this Court is upon a question of law, namely, whether that decision was open on the evidence. The New South Wales *Workers' Compensation Act* was amended in 1942 by substituting " or " for " and " in the definition of injury in s. 6, so that a worker can sustain his claim to compensation by proving either of the factors prescribed by the section. The question argued before us was whether the injury was received by the respondent in the course of his employment.

I should, but for the dissidence on the Bench, be content to adopt the reasoning of *Jordan* C.J. on this question. One is rather apt to get lost in the forest of cases on the subject. And as in the interpretation of wills, where the interpretation of a word or phrase in one will is pressed upon a court as conclusive of the meaning of the same word or phrase in a different context in another will, so in this class of case decisions are cited where the facts bear a family likeness to those in the case under consideration but do not determine the decision. For instance, the two decisions in this Court of *Henderson's Case* (1) and *Whittingham's Case* (2) were concerned with the interpretation of the West Australian Act and were based on facts different in each case and different from the facts in this case and do not affect its determination. Do then the relevant facts found by the Commission bring the case within that part of the definition section which prescribes that the injury received arose in the course of employment ? The basic facts are that the respondent, while he was on the field of operations, or, as Lord *Porter* puts it in *Weaver* v. *Tredegar Iron and Coal Co. Ltd.* (3), " within the sphere or area of his employment ", during the allotted time off for lunch and rest, received the injury by opening the bottle—an act not

(1) (1937) 58 C.L.R. 281. (2) (1931) 46 C.L.R. 22.
(3) (1940) A.C., at p. 990.

dissociated from the course of his employment. Indeed, if the manner of doing this act were relevant it is to be remembered that the Commission had found that the method of opening the bottle was not unreasonable. These facts, in my opinion, bring the case within the principles stated in the speeches of Lord *Atkin* (1), Lord *Wright* (2), and Lord *Porter* (3) in *Weaver's Case* (4).

In my opinion the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales upon a case stated by the Workers' Compensation Commission pursuant to the *Workers' Compensation Act* 1926-1942 (N.S.W.).

The material facts are :—The worker was employed by the appellants as a saddler. He worked in a big room with about twenty-four others and nearly all ate their lunch in the workroom with the knowledge and encouragement of the employers. Indeed, an employer, " the boss," as the worker described him, had his own lunch at his work bench. Shortly before lunch a boy came round to take orders for lunch. But the worker, I gather, had some sandwiches with him for his lunch but gave an order to the boy for a bottle of coca-cola—a soft drink—which was brought to the worker in the workroom. But no means of opening the bottle were provided, so the worker took the bottle to a vice to open it. He placed the tin top or crown seal, as it is called, on the side of the vice and hit it with a closed fist and he heard a bang and felt something hit his left eye whereby he lost the sight of that eye.

The *Workers' Compensation Act* 1926-1942 of New South Wales provides that a worker who receives personal injury arising out of or in the course of employment whether at or away from his place of employment shall receive compensation from his employer in accordance with the Act. The only question for this Court is whether there is any evidence to support the Commission's finding that the injury sustained by the worker arose out of or in the course of his employment.

It is settled " that the course of the employment is not determined by the time at which a man is actually occupied on his work. There may be intermissions during the working hours when he is not

(1) (1940) A.C., at p. 966.
(2) (1940) A.C., at p. 973.
(3) (1940) A.C., at p. 990.
(4) (1940) A.C. 955.

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actually working." "Times during which meals are taken, moments during which the man is proceeding towards his work from one portion of his employer's premises to another, and periods of rest may all be included." And his work is not "necessarily confined to his employer's premises." "The course of the employment may begin or end some little time before or after he has downed tools or ceased actual work" (*Weaver* v. *Tredegar Iron and Coal Co. Ltd.* (1)). But it is not every injury that happens during intermissions for meals or such other periods that would arise out of or in the course of the worker's employment. "Each case must depend upon its particular facts, which must be examined and weighed before arriving at a conclusion whether or not the" injury happened out of or in the course of the employment: See *Knowles* v. *Southern Railway Co.* (2); *Clayton* v. *Hardwick Colliery Co. Ltd.* (3).

In this case there is sufficient evidence to support the Commission's finding. The worker took his lunch in the workroom with his employers' knowledge and encouragement; a boy was even told off to obtain what the worker required in the way of refreshments, including liquid refreshments. Clearly the employers contemplated that the worker might obtain some liquid refreshment with his lunch and there was nothing unlawful or even unreasonable in obtaining a bottle of coca-cola. But the employers provided no means for opening the bottle, and the worker took it to a vice so that he might force off the tin top or crown seal in a manner that was quite reasonable and that suggested no unnecessary risk. The result was untoward and wholly unexpected, but yet an incidental risk of the employment to which the worker was exposed at that particular place and time. Some extravagant illustrations were put in argument, such as a worker lunching in his workroom with the employer's sanction and developing ptomaine poisoning from eating his sandwiches or being poisoned from drinking liquids containing deleterious substances, but "of course," as *Atkin* L.J. said in *Smidmore* v. *London and Thames Haven Oil Wharves Ltd.* (4), "if the risk from which he suffered was a mere risk that anybody incurs in taking tea, that is to say that he might drink his tea too hot, or that he might choke himself with too large a piece of bread and butter, or that he might injure himself by cutting himself with

(1) (1940) A.C., at pp. 973, 990.
(2) (1937) A.C. 463, at p. 469.
(3) (1915) 9 B.W.C.C. 136.
(4) (1921) 14 B.W.C.C., at p. 120.

a knife in spreading his butter or otherwise using it, I think a difference might very well arise " and would afford no evidence that the injury happened out of or in the course of the worker's employment. *Whittingham* v. *Commissioner of Railways* (*W.A.*) (1) was much relied upon for the appellant. The decision was, I think, correct, and is an illustration of the proposition that each case must depend upon its particular facts. It is true, as the Chief Justice of the Supreme Court pointed out in the Court below, that the Act under which the case was decided gave an appeal to the Supreme Court not only on questions of law but also on questions of fact. But I do not think the case can or should be distinguished on that ground. Speaking for myself, the basis of the decision was that there was no evidence that the injury arose out of or in the course of the worker's employment.

This appeal should be dismissed.

McTiernan J. The Workers' Compensation Commission of New South Wales made an award in this case in favour of Maxwell Walter Mould under provisions of the State's *Workers' Compensation Act* 1926-1942, which confer upon a worker the right to recover compensation from his employers, if the worker receives an injury arising out of or in the course of his employment. Unlike the English Act, these provisions do not require that the injury should be caused by " an accident " and, since the amending State Act of 1942, the conditions of the worker's right are alternative, not cumulative.

At the appellants' request the Commission, by a case stated in pursuance of the Act, referred to the Supreme Court for decision the question which, by reason of the provisions of the Act, is an alternative one, whether there is evidence that the injury to Mould's left eye, suffered while he was on the appellants' premises, and in respect of which the award was made, arose out of or in the course of his employment with them. The Commission found that the injury arose both out of and in the course of the employment. The Supreme Court decided only that the injury arose in the course of the employment. Accordingly it answered the question in the affirmative : the Court could do this without answering the second limb of the question, whether there is any evidence that the injury arose out of the employment, because of the form of the question.

(1) (1931) 46 C.L.R. 22.

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The appellants, who are manufacturing saddlers, employed Mould, a boy of sixteen years, to sew paper rods together to be packed into saddles. His employment began on 24th August 1942 and was upon the terms that his daily working hours were to be from 8.10 a.m. to 5.30 p.m., with an interval from 1 p.m. to 1.30 p.m. for luncheon : the interval was not part of his wage-earning time. The scene of his work was " a big room " on the employers' premises, in which Mould worked with twenty-four other employees. They were all at liberty during the luncheon interval to remain in the room and to take their meals there or to leave the premises. Mould and all the employees, but two, ate their lunches in the room on every working day from 24th August 1942 down to 1st September 1942, the date of the injury. The " boss " also on those days ate his lunch in the room at his bench. It was the practice for a boy to take orders before 1 p.m. from the workers for the things they would like to buy for luncheon. On 1st September, before 1 p.m., Mould asked the boy to get him a bottle of coca-cola. At 1 p.m. Mould and other employees went to a bench in the " big room " to eat their luncheon. Mould's consisted of ham sandwiches and the coca-cola. He did not have an opener. After he ate a sandwich he wished to open the bottle. He took it to a vice which he had sometimes used in connection with his work in the room, and with his closed fist hit down on the metal top of the bottle in order to knock it off against the vice. There was a bang, and the metal top flew into his left eye causing an injury which deprived him of the sight and rendered necessary the removal of the eye and the insertion of an artificial eye.

The decision of the question whether an injury which a particular worker receives arises in the course of his employment necessarily depends on the facts of the case. The decisions, however, establish some principles which are of general application in the decision of the question. It is in accordance with those principles to say that a worker may be eating his midday meal in the course of his employment if the circumstances are that he takes it at a permitted time and at a permitted place on the employer's premises. The evidence here satisfies those conditions.

No rule is being laid down that the course of the employment would not have been broken, no matter what fantastic thing Mould might have done in the workshop during the time allotted

for his midday meal. The way in which he opened the bottle did not require the Commission to find, in the circumstances, that it was behaviour dissociated from the affair of taking his meal in the workshop. That involved the opening of the bottle. The taking of the meal was in the circumstances incidental to his industrial job and accordingly in course of his employment. In my opinion there is evidence that the injury to his eye arose in the course of the employment.

In denying liability the appellants rely on *Whittingham* v. *Commissioner of Railways (W.A.)* (1). It is important to draw attention to the following passage in this case in the judgment of *Dixon* J. After mentioning that the decisions had been reviewed in *Pearson* v. *Fremantle Harbour Trust* (2) he said: "As the test is not, and could not be, whether the employee was obliged to act as he was doing when the accident occurred, the inclusion of things arising out of the actual performance of his duty was, no doubt, inevitable, but, as a result, the sufficiency of the connection between the employment and the thing done by the employee cannot but remain a matter of degree, in which time, place and circumstance, as well as practice, must be considered together with the conditions of the employment. In this case the question appears to be whether the presence of the appellant at the place where he was struck by the cricket ball was connected with the actual performance of his duty in a sufficient degree" (3). That appeal was on fact as well as law. In the result *Dixon* J. thought that the connection between what Whittingham was doing when injured and the work on which he was employed was too remote to be described as incidental. If it were incidental it would have been in the course of the employment.

It is important to notice how, in *Sparey* v. *Bath Rural District Council* (4), Lord *Atkin* deals with points similar to those that were made the groundwork of the decision in *Whittingham's Case* (1). His Lordship affirmed that an accident could arise in the course of the employment even if it did not occur during the worker's wage-earning time. Lord *Atkin* also explained that the test whether the worker had a duty arising out of his contract to be at the place where he was injured is not the sole

(1) (1931) 46 C.L.R. 22.
(2) (1929) 42 C.L.R., at p. 330.
(3) (1931) 46 C.L.R., at p. 29.
(4) (1931) 146 L.T. 285, at p. 287; 24 B.W.C.C. 414, at pp. 421, 422.

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or a sufficient test whether the accident arose in the course of the employment. He said: "It appears to be very satisfactory—indeed, we are bound by it in the cases to which it has been applied, namely, cases where an accident has happened to a man, as in one case, four or five miles away from the sphere of his employment and before he either entered on the area of his occupation or upon his wage-earning time—but that it has a general application is, I think, different." *Hewitson's Case* (1) was one of the last-mentioned class.

Again, in *Weaver* v. *Tredegar Iron and Coal Co. Ltd.* (2) Lord *Wright* said: "With the greatest respect the position in the present case is quite different" (from *Hewitson's Case* (1)), "and I am unable to agree with the Court of Appeal when they say that the appellant could only succeed if he could show that he was on the platform by reason of an obligation subsisting between himself and his employers to avail himself of the facilities afforded by the halt and the stoppage of trains thereat. Nor do I agree that it is relevant to observe that when he stepped from the colliery premises (I suppose when he stepped from the bottom step of the stairway on to the platform) he was free until the next day from any nexus of obligation to his employers. That is equally true in any relevant sense of the whole time after he ceased work, because, as soon as he did so, he would not have been bound to obey orders to work. He had finished his allotted day's work and was, apart from some emergency, free to go home. But all the same the course of employment admittedly continued after he left his actual work and was engaged in the process of leaving the premises. In the same way a man in the intervals during the day's work does many things, such as taking refreshment or moving about for personal reasons, which cannot in any ordinary sense be said to be in discharge of a duty or obligation to his employers. Yet he may be entitled still to claim that the course of his employment continues. I deprecate the use in this connection of such words as 'nexus of obligation.' If they mean the same as 'the course of the employment,' they are superfluous. If they mean something else, they may stultify the operation of the Act."

The present case resembles *Whittingham's Case* (3) in that Mould was injured during the luncheon interval. He was at liberty to remain on the employers' premises or leave them during the luncheon interval. This interval was his own time, not his employers', and it

(1) (1924) A.C. 59.
(2) (1940) A.C., at pp. 978, 979.
(3) (1931) 46 C.L.R. 22.

was not part of his wage-earning time. But I think that the passage cited from *Whittingham's Case* (1) does not preclude the view that Mould was injured in the course of his employment especially because there is the additional fact that he was eating his meal when injured.

It has been observed that the appeal in *Whittingham's Case* (2) was on fact as well as law. The passage cited from the judgment of *Dixon* J. would not justify the supposition, if it were made, that if Whittingham had been injured whilst taking his lunch his Honour would have decided that the accident did not arise in the course of the employment. The principles which were applied in *Knight* v. *Howard Wall Ltd.* (3), support the view that there is evidence in the present case that the accident arose in the course of the employment.

Another argument for the appellants was that there is no evidence of any sufficient causal connection between the employment and the injury. In my opinion this argument cannot succeed. The inquiry whether a workman received an injury arising out of or in the course of his employment raises two separate questions (*Simpson* v. *London, Midland and Scottish Railway Co.* (4)). There are many cases in which it was held that an accident arose in the course of the employment, but not out of the employment. Some instances are : *Craske* v. *Wigan* (5), *Brice* v. *Edward Lloyd Ltd.* (6), *Smith* v. *Fife Coal Co. Ltd.* (7), *J. & P. Hutchison* v. *M'Kinnon* (8), *Lancashire & Yorkshire Railway Co.* v. *Highley* (9), *Stephen* v. *Cooper* (10)—see also *Stewart* v. *Metropolitan Water, Sewerage and Drainage Board* (11). In *Armstrong, Whitworth & Co.* v. *Redford* (12) Viscount *Finlay*, in his dissenting judgment, gave an example of an accident that in his view arose out of, but not in the course of the employment. In *Dover Navigation Co.* v. *Isabella Craig* (13), Lord *Wright* said : " What arises ' in the course ' of the employment is to be distinguished from what arises ' out of the employment.' The former words relate to time conditioned by reference to the man's

(1) (1931) 46 C.L.R., at pp. 26, 28.
(2) (1931) 46 C.L.R. 22.
(3) (1938) 55 T.L.R. 227 ; (1938) 4 All E.R. 667.
(4) (1931) A.C. 351, at p. 357.
(5) (1909) 2 K.B. 635, at pp. 637, 639.
(6) (1909) 2 K.B., at p. 806.
(7) (1914) A.C. 723, at p. 731.
(8) (1916) 1 A.C. 471, at pp. 477, 485.
(9) (1917) A.C., at p. 372.
(10) (1929) A.C. 570, at p. 575.
(11) (1932) 48 C.L.R. 216, at pp. 227, 228.
(12) (1920) A.C., at pp. 762, 763.
(13) (1940) A.C. 190, at p. 199.

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service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment, that is directly or indirectly engaged on what he is employed to do, gives a claim to compensation unless it also arises out of the employment." In *Thom* v. *Sinclair* (1) Lord *Shaw of Dunfermline* said : " There have been many cases dealing with the consideration of those words in the *Workmen's Compensation Act*, namely, 'arising out of the employment.' The criticism is, of course, correct that those words must be taken to signify something more in the sense of limitation than 'in the course of' the employment, and that both of those expressions of condition must be satisfied before the Act can apply " —See also per Viscount *Haldane* (2). In the New South Wales Act the conditions are expressed alternatively, not cumulatively. Hence many cases which were decided to be outside the English Act would come within the New South Wales Act. In *Smith* v. *Australian Woollen Mills Ltd.* (3), the court said that an injury sustained by a diabetic workman, who fell while carrying on his work, in consequence of a faint which resulted solely from his diabetic condition, arose in the course of his employment. The question in controversy in that case was whether the injury arose out of the employment.

In my opinion the appeal should be dismissed.

WILLIAMS J. The Commission found that, on 1st September 1942, the respondent, while he was having his midday meal in the appellants' workshop where he was employed, experienced some difficulty in removing the crown seal from a bottle of a non-intoxicating beverage which he proposed to drink as part of his meal. He walked across the workshop to a vice, held the side of the metal seal in contact with the vice, and, with a clenched fist, hit down on the seal. In consequence something flat from the bottle, apparently the crown seal, hit him in the left eye, causing a serious injury to his eye. The Commission also found that the appellants permitted the respondent and other employees to eat their midday meals in the workshop and provided hot water, that at the time the respondent sustained the injury he was doing something which was sufficiently associated with his employment to make it incidental to his

(1) (1917) A.C., at p. 140. (2) (1917) A.C., at p. 133.
(3) (1933) 50 C.L.R. 504.

employment, and that the injury arose out of and in the course of his employment.

The relevant Act, namely, the *Workers' Compensation Act* 1926-1942 (N.S.W.), provides, so far as material, that injury means personal injury arising out of or in the course of employment, so that the appeal will fail if in law it was open to the Commission upon the evidence to find that the injury which the respondent suffered occurred in the course of his employment.

In the Supreme Court *Jordan* C.J., after referring to numerous authorities which establish that a workman injured while taking refreshment on the premises at a permitted hour may suffer an injury in the course of his employment, summed up the present state of the law as follows :—" I think that if a worker is using part of his employer's premises for his own purposes during a rest period, it is immaterial, in this connection, whether he is doing so by the mere permission of his employer or in exercise of a legal right conferred by the contract of employment. In the light of these authorities, if the terms of the contract of employment provide that the worker, during the course of the stipulated working day, may cease work for one or more short periods for the purposes of resting or refreshing himself, and he (the employer not objecting) on such an occasion occupies the period between the cessation of one period of work and the commencement of another by remaining in his workroom, it is, to say the least of it, possible to regard him as being in the course of his employment during the whole of the period that he so remains—as still doing something which can be regarded as being incidental to his employment. Nor would his position be bettered or worsened in this respect if he spent part of the time in eating and the remainder in dozing or all of it in resting. No doubt if in such a case he left his employer's premises altogether he would (prima facie at any rate) necessarily cease to be in the course of his employment whilst so absent. Between these two extremes there is an infinite variety of possibilities, where the question is essentially one of degree and of fact " (1).

I wish to express my entire concurrence with this summary. It is in full accord with the following passages in the recent speech of Lord *Wright* in *M'Garvey* v. *Caledonia Stevedoring Co. Ltd.* (2), where his Lordship said :—" It is true that authorities in this House and

(1) (1943) 44 S.R. (N.S.W.), at pp. 117, 118; 61 W.N., at p. 120.
(2) (1943) 169 L.T 1, at p. 3.

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in the appellate courts have held that the course of a man's employment may not be limited to the time when he is actually working but may include time when he is off work, such as meal times and times when he is going to and from his work, at least while he is on his employer's premises, or while he is traversing a place which, though not part of his employer's premises, he is only entitled to traverse because he is going to or coming from his work. I need not now develop this construction of the Act, because it has quite recently been fully explored in *Weaver* v. *Tredegar Iron and Coal Co.* (1), in which all the earlier cases are examined. . . . The supper-time interval would have fallen within the period of the man's employment, to the extent at least of the time when he was going to and from the place on the quayside where he was working, so long as he was either on his employer's premises or was traversing a place which he was permitted to go across in order only to reach his work, even though that place was not within the possession or control of his employer. The use of such a way for that purpose is 'within the contemplation of both parties to the contract as necessarily incidental to it,' as Lord *Finlay* L.C. said in reference to a case of that type in *John Stewart & Son* (1912) *Ltd.* v. *Longhurst* (2)." His Lordship no doubt reserved his opinion as to whether the time the workman was eating his supper was included in the course of the employment because the workman took his supper off the premises at his own home, but it is to be observed that he included in the course of the employment the whole of the supper interval when the workman was on his employer's premises.

I also agree with the learned Chief Justice that the cases in this Court of *Whittingham* v. *Commissioner of Railways* (*W.A.*) (3) and *Henderson* v. *Commissioner of Railways* (*W.A.*) (4) are decisions which turned on their own particular facts, and that no principle of construction was laid down in the judgments which required the Commission on the different facts of the present case to hold that the injury was not received in the course of the employment. All that these judgments do is to indicate circumstances which it is material for the judge of fact to take into consideration when weighing the evidence in order to determine whether it warrants a finding

(1) (1940) A.C. 955; 164 L.T. 231.
(2) (1917) A.C., at p. 253; 116 L.T. 763, at p. 764.
(3) (1931) 46 C.L.R. 22.
(4) (1937) 58 C.L.R. 281.

that the injury was received in the course of the employment. Further, it may well be that the significance to be attached to some of these circumstances will require to be reconsidered in the light of the more recent decisions of the House of Lords.

Mr. *Fuller*, in view of the many authorities to the contrary, did not rely exclusively on the contention that the taking of meals by the respondent on the appellants' premises could not, in all the circumstances, be held in law to be in the course of the employment. He also relied on the nature of the injury which the respondent received in the course of the meal, and contended that an injury received during a meal would only be received in the course of employment if the injury was of a local nature, or, in other words, if the injury was in some way associated with the use of the property provided by the employer for the purposes of the meal, as, for instance, from the falling down of the wall in *Blovelt* v. *Sawyer* (1), the explosion of the primus stove in *Stewart* v. *Metropolitan Water, Sewerage and Drainage Board* (2), and the game of darts in *Knight* v. *Howard Wall Ltd.* (3). But, whereas the expression " out of the employment " denotes a certain degree of causal connection between the accident and the employment, the expression " in the course of the employment " points to a period of time conditioned by the workman's service (*Dover Navigation Co. Ltd.* v. *Isabella Craig* (4); *Cadzow Coal Co. Ltd.* v. *Price* (5)), so that, if the luncheon interval is included in that period, an injury received by the respondent during his lunch would not be an injury outside the course of his employment merely because in the course of having lunch he did something in an extremely negligent, rash or foolish way (*Harris* v. *Associated Portland Cement Manufacturers Ltd.* (6)). The three cases given as instances are more relevant on the question whether an injury arose out of the employment than on the question whether it arose in the course of the employment.

It is an ordinary incident of taking lunch for an employee to drink from a bottle of a non-intoxicating beverage. The Commission found that the method the respondent used to remove the crown seal was a reasonable one. But, even if it was a rash or foolish way to attempt to open the bottle, this would not, in my opinion, be

(1) (1904) 1 K.B. 271.
(2) (1932) 48 C.L.R. 216.
(3) (1938) 55 T.L.R. 227; (1938) 4 All E.R. 667.
(4) (1940) A.C., at pp. 193, 199.
(5) (1944) 60 T.L.R. 104; (1944) 1 All E.R. 54, at p. 58.
(6) (1939) A.C. 71.

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sufficient to place this particular act outside the course of the employment when the intermission for the taking of lunch fell from a temporal point of view within it.

For these reasons I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *Samuel H. Simblist.*

Solicitor for the respondent, *Aidan J. Devereux.*

J. B.